IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 40 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG Sd/-

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1, 2 & 4 YES; 3 & 5 NO**

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
PRAKASH OIL INDUSTRIES AND GINNING FACTORY - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
MR SN SOPARKAR for Respondent(s) : 1,

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CORAM: **HONOURABLE MR. JUSTICE R.S.GARG**
and
HONOURABLE MR. JUSTICE D.H.WAGHELA

Date: 16 /11/2006

C.A.V. JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.H.WAGHELA)

1. The Income Tax Appellate Tribunal has, at the instance of the Revenue, referred for opinion of this Court the following question arising out of ITA No.3636 and 3905/Ahd/1990related to assessment year 1984-85:

> *"Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in holding that the assessee firm is entitled to the benefits of Amnesty Scheme in respect of the entire amount of Rs.2,25,000/- ?"*

2. The relevant facts of the case, in short, are that the assessee is a partnership firm at whose premises search and seizure operations were carried out on 1.6.1984, during the course of which, various records were seized and statement of the accountant was recorded. Simultaneously, search operation at the residential premises of the main partner was also carried out and statements of various partners were also recorded. The answer to a question put to the accountant had revealed that a paper found from his custody during the search reflected distribution of income, aggregating to Rs.2,25,000/-, earned by the firm but not reflected in the books of account. He had further stated that the amount was brought and

distributed by the main partner and was earned by the firm over a period of six years. That partner had, during the search at his residence, denied any such activity. The other partners had, in their replies, put different interpretations on the same piece of paper.

2.1 It was not in dispute that, after the search on 1.6.1984, notice under section 148 of the Income-tax Act, 1961 was issued to the assessee on 6.3.1986 and, on 31.3.1986, revised return showing a total income of Rs.3,41,000/- was filed under the Amnesty Scheme. The revised return included a sum of Rs.2,25,000/- as additional income offered for tax under the Amnesty Scheme. A note appended with the return clearly stated that the additional income included Rs.2,25,000/- as admitted by the accountant of the firm on the basis of the seized paper, being the unaccounted profit for the past six years. The note also mentioned that the appellant was not willing to dispute the testimony of the accountant and further that it was not willing to spread over the amount over the past six years in order to save further litigation and to avail the immunity granted under the Amnesty Scheme.

2.2 The assessing officer did not consider the aforesaid amount as voluntarily declared, treated the unaccounted profit of Rs.2,25,000/- as concealed business income and added it along with the extra amount of Rs.25,000/-. The learned CIT (Appeals) allowed the benefit of the Amnesty Scheme to the assessee firm on a sum of Rs.1,87,500/- out of Rs.2,25,000/- on the ground that, according to the statement of the accountant, only 1/6th of the sum would be the income of the year in question and accordingly disallowed the benefit of the Amnesty Scheme on the amount of Rs.37,500/-. On further appeal, the appellate Tribunal held that the assessee was entitled to the benefit of the Amnesty Scheme in respect of the entire amount of Rs.2,25,000/- on the grounds that the revenue had not taken any action for two years on the basis of the statement recorded in the year 1984, the department had failed to detect any concealed income and merely seizure of a paper and a statement of an employee which had been rebutted immediately by the partner of the firm could not be treated as detection. The Tribunal heavily relied upon the following observations of the Calcutta High Court in ***Anand Kumar Saraf & Others v. CIT [(1995) 211 ITR 562]:***

"....In the instant case, certain documents and papers were seized. They might or might not reveal concealment. Even the seizure could not lead to a prima facie belief as to concealment as the contents, purport and the implications of the documents were yet to be gone into. Therefore, at the point of time the return under the amnesty scheme was filed, the assessing officer admittedly had no idea as to whether the seized papers would reveal any concealment. The mere fact that the petitioner-appellant's case was awaiting a probe with reference to his past records as well as extrinsic sources could not lead to his ouster from the scope of the scheme.....Since the department had not looked into the seized papers and had not carried out investigation prior to March 31, 1986, it cannot be said that by the mere fact of seizure, the tax authorities could be said to have even a prima facie belief that the concealment of income and wealth by the assessee had been detected."

3. Learned counsel Mr.M.R.Bhatt, appearing for the revenue, assailed the above part of the decision of the Tribunal on the grounds that the Tribunal had completely overlooked the factum of notice issued to the assessee on 6.3.1986 under section 148, prior to filing of the revised return. He submitted that the unaccounted income

was already detected and material in support thereof was collected. Absence of subsequent action thereon could not wipe out the factum of detection. And, there cannot be, in the eye of law, a voluntary and *bona fide* disclosure after such detection of unaccounted income.

4. The so-called Amnesty Scheme is in the form of an order dated 14.2.1986 couched in the following terms:

> *"Order*
>
> *In exercise of the powers conferred by clause (a) of sub-section (2) of section 119 of the Income Tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby directs that the Income-tax Officer and the Inspecting Assistant Commissioner of Income-tax shall not initiate any proceeding for imposition of a penalty on a person or impose penalty on him for an offence under clause (a) or clause (c) of sub-section (1) of section 271 or section 273 in respect of any assessment year up to and including assessment year 1985-86 in a case, if he is satisfied that such person:*
>
> *(a) has prior to the detection by the Income-tax Officer, or, as the case may be, the Inspecting Assistant Commissioner of Income-tax, of the concealment of particulars of*

income or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made between the 15th day of November, 1985 and the 31st day of March, 1986, a full and true disclosure of such income;

(b) has, on or before the 31st March, 1986, paid the tax on the income disclosed; and

(c) has co-operated in any enquiry relating to the assessment of his income.

2. This order shall come into force on the 17th day of February, 1986."

(underlines added)

5. Thereafter, by circular No.451 dated February 17, 1986, clarifications were issued regarding declaration of higher income, of which the relevant ones may be quoted hereunder:

***"Question No.1**- What will be the procedure required to be followed by the assessee who wants to declare income or wealth in respect of the past years?*

(a) in case where the assessments pertaining to those years are already completed;

(b) in case where the assessments in respect of

those years are pending.

***"Answer**: In cases where the assessments are already completed, the taxpayer should approach the concerned Commissioner of Income-tax with the full disclosure of the amounts of income and/or wealth concealed in various years and should also file returns for the relevant years. He should also produce evidence of payment of taxes before March 31, 1986. The filing of the returns will be regularised by issue of formal notices under section 148 of the Income-tax Act/section 17 of the Wealth-tax Act. In cases where the assessments are pending, the taxpayer should file revised return before the Income-tax Officer along with evidence of payment of taxes.*

***"Question No.12**: Can immunity given by the circulars be availed of by assessees whose premises have been searched by the tax authorities?*

*"**Answer**: No.*

***"Question No.19**: Kindly clarify the expression "before detection by the department"?*

***"Answer**: If the Income-tax Officer has already found material to show that there has been concealment, that would mean the Department has*

detected the concealment. If the Income-tax Officer only had prima facie belief, that would not mean concealment has been detected.

***"Question No.30**: Whether an assessee could make a declaration in respect of assets or income which is not the subject-matter of seizure?*

***"Answer**: Yes, if it has not been already found out in the course of the search."*

(underlines added)

6. Learned senior advocate Mr.Soparkar, appearing for the assessee, vehemently argued that the Tribunal had recorded a finding of fact to the effect that the Department had failed to detect any concealed income and the offer of the sum of Rs.2,25,000/- was made *suo motu* by the firm to avail the benefits of the Scheme and to avoid further litigation. That finding could not be disturbed without being challenged as perverse, according to the submission. On merits, he submitted that the statement of the accountant made during the search must be read as a whole to conclude that the concealed income was earned over a period of six years for which there cannot be common assessment unless full benefit of the Amnesty Scheme was accorded to the assessee. He

relied upon the following part of Circular No.423 dated 26.6.1985 of the Central Board of Direct Taxes:

> *(Reported in Para 3, 155 ITR (St.) Page 45.*
> *"Clarification has also been sought on the question whether a taxpayer, who is found to have concealed his income for any earlier year, can claim that such income should not be assessed in that year on the ground that he had included such income in the estimate of advance tax furnished by him for the financial year 1985-86. Such a claim is clearly untenable. Income which relates to a particular assessment year can be assessed only in that year. Hence a taxpayer will not be able to claim that any part of the higher income declared by him for purposes of payment of advance tax should be set off against the income found to have been concealed by him for any earlier year. In such cases, the advisable course for the taxpayer will be to, voluntarily and in good faith, make a full and true disclosure of his concealed income, prior to its detection by the Income-tax Officer, and then make an application to the Commissioner of Income-tax for the reduction or waiver of penalty and interest under section 273-A of the Income-tax Act."*

7. Mr.Soparkar relied upon the observations of the Supreme Court in ***India Cements Ltd. v. Commissioner of Income-tax, Madras [(1966) 60 ITR 52]*** for the proposition that, in a reference, the High Court must accept the findings of fact made by the Appellate Tribunal and it is for the person who has applied for a reference to challenge those findings first by an application under section 66 (1). If he has failed to file an application under section 66 (1) expressly raising the question about validity of the findings of fact, he is not entitled to urge before the High Court that the findings are vitiated for one reason or the other.

7.1 The learned senior advocate also relied upon the judgment of this Court in ***Commissioner of Income-tax v. Mayank Rotoplast Industries [(2002) 253 442]*** wherein the Revenue's case was that a return filed after survey of the business premises of an assessee was a return on detection of concealment and cannot be treated as voluntary disclosure of income. The Tribunal found as a fact that nothing incriminating was found against the assessee during the course of survey; and the question whether the detection was made as a

result of survey was a question of fact. The court observed that, whether as a result of any proceedings the assessing officer had detected something incriminating and thereupon the assessee had filed return was always a question of fact. The Tribunal could not have reached to the conclusion that in no case the return filed after conduct of survey but before any search could ever be voluntary. In fact, it was an assumption that such could be the case, but the proceedings had to disclose that during the survey something incriminating had been found against the assessee and that it led to filing of return. That part of the controversy was held to be a question of fact which could not give rise to a question of law which might be required to be referred except in case the question was raised about vitiating such finding on such ground that renders the finding reached by the Tribunal open to interference. The court ultimately held that, if the Tribunal had reached its findings of fact, by taking into consideration the fact of survey, that no detection had been found, no question of law arose. Accordingly, the applications for reference under section 256 (2) were rejected.

8. Per contra, it was submitted by learned

counsel Mr.M.R.Bhatt, for the revenue, that, as observed by the Supreme Court in ***CIT v. Calcutta Agency Ltd. [(1951) 19 ITR 191]***, even a finding of fact could be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. It was the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. But, at the same time, it was indicated that such a finding ought to have been arrived at on evidence and even a finding of fact can be assailed by contending that there was no evidence in respect of the finding said to have been arrived at by the Tribunal. In a leading decision of the Supreme Court in ***Sree Meenakshi Mills Ltd. v. CIT [(1957) 31 ITR 28]***, a caveat was added by observing that, if it appears to the High Court that there was no evidence before the Tribunal upon which a reasonable man could come to the conclusion which the Tribunal has reached, the High Court could come to a conclusion entirely different from that of the Tribunal. The court laid down the principle much more explicitly by stating that such a finding could be reviewed on the ground that there was no evidence to support it or that the finding was perverse. Again, a finding ought to have been arrived at by

assessing the cumulative effect of all the facts and circumstances and the facts and circumstances cannot be considered in isolation. In between the domains occupied by the questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions falling within that category are known as mixed questions of law and fact. Those questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principle of law to the facts ascertained. It was also observed by the Supreme Court in ***CIT v. Daulat Ram Rawatmull [(1973) 87 ITR 349]*** that a finding on a pure question of fact arrived at by the Tribunal cannot be disturbed by the High Court on a reference unless there was no evidence before the Tribunal upon which a reasonable man could come to the conclusion to which the Tribunal had come. If that was not the case, the High Court cannot exercise jurisdiction even though the High Court would, on the evidence, have come to a conclusion entirely different from that of the Tribunal. A finding can be reviewed only on the ground that there was no evidence to support it or it was perverse. The court quoted with approval the following observations of

Viscount Simonds in ***Edwards (Inspector of Taxes) v. Bairstow [(1955) 28 ITR 579], 586 (HL) (page 358):***

> *"....It is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained...."*

In ***CIT v. S.P.Jain [(1973) 87 ITR 370],*** it was held that, since the Tribunal failed to take into consideration the relevant material on record and, in arriving at a finding, it had acted on inadmissible evidence and based its conclusions on conjectures and surmises, it was open to the High Court to ignore the findings of the Tribunal and to re-examine the issues arising out of the decision on the basis of the material on record. In ***Salem Co-operative Central Bank Ltd. v. CIT [(1993) 201 ITR 697]***, the Tribunal had proceeded upon an assumption which was erroneous in law. Disposing the reference arising therefrom, the High Court took the view that it could not look on helplessly with reference to an error which was manifested in the contention

of both sides. Upon the matter being carried to the Supreme Court, it was strenuously argued by the assessee that the High Court exceeded its jurisdiction under section 256 in giving direction to consider the case on all the points. The Supreme Court negatived the contention and observed that the High Court was right in issuing the directions. If the Tribunal proceeded upon an assumption which was erroneous in law, it could not be said that the High Court was bound by the terms of the questions referred and could not correct the erroneous assumption of law. The court observed (at page 701) as under:-

> *"If such power is not conceded to the High Court, the result would be that the answer given by the High Court may equally be erroneous in law. Such a situation cannot certainly be countenanced. It would not be in the interest of law or justice."*

In the opinion of the Supreme Court, it was not as if the High Court had asked for any further investigation and the High Court did not possess such powers, but the High Court could certainly ask the Tribunal to do what it was required to do in law.

8.1 After considering the above judgments

and more recent decision in ***Jaiswal (S.P.) v. CIT [1997) 224 ITR 619]***, the Division Bench of this Court in ***CIT v. Deepak Nitrite Ltd. [(2001) 247 ITR 362]***, expressed the opinion that a pure question of law, unrelated to the facts, can always be challenged and the High Court can examine such a question in the exercise of its jurisdiction under section 256 of the Income-tax Act, 1961. On a mixed question of law, whereas the finding of the Tribunal on the facts found has to be treated as final, the legal effect of such finding is a question of law and can be reviewed by the High Court. Likewise, a finding on a question of fact is open to challenge if there is no evidence to support that finding or the finding is perverse or is such as could not have been arrived at by a reasonable man on the facts and in the circumstances of the case. In light of these principles, it was held, in the facts of that case, that the Tribunal could not have reached the finding which had been arrived at by it. The Court went on further to observe that, if a finding of fact was not based on evidence on record or was arrived at in disregard of evidence which was in the nature of admission on behalf of the assessee, such a so-called finding could not be said to be a finding in the eye of law which could be treated as final and

binding on this court. Such a purported finding could not close the doors of this court to the Revenue in raising a contention that the Tribunal had committed an error of law in recording a finding and that the order passed by the Tribunal was, therefore, vitiated. Ultimately, after considering the arguments of the assessee, *inter alia*, that the court had no jurisdiction to interfere with a finding of fact arrived at by the Tribunal nor could it re-appreciate the evidence with a view to interfere with such a finding without an application by the Department invoking sub-section (2) of section 256, this court took a different view of the facts and, holding that the expenditure in question was "capital expenditure", answered the reference in favour of the Revenue.

9. In the facts of the present case, the terms of reference are not only wide enough, but, in fact, obliges the court to look at the facts on the record and circumstances of the case to opine as to whether the Tribunal was justified in holding that the assessee was entitled to the benefits of the Amnesty Scheme. The facts and circumstances narrated hereinabove were clear and beyond the pale of controversy. The essential requirement of application of the Amnesty Scheme

as per the order therefor was the satisfaction that the assessee had, voluntarily and in good faith, made a full and true disclosure, within the prescribed period, of the concealed income prior to its detection. According to the clear and categorical answer to Question No.12 in the clarifications, the assessee whose premises had been searched by the tax authorities could not avail of the Scheme. And, according to the clarification in reply to Question No.19, if the income-tax authorities had already found material to show that there was concealment, that would mean that the Department had detected concealment. Finding of the material indicating concealment of income is expressly equated with detection of concealment, and no further action is required for establishing detection. Thus, where mere finding of material indicating concealment of income before the disclosure was sufficient, benefits of the Amnesty Scheme could not be claimed after finding of material. Going by the dictionary meaning of the word "detection", it means, according to Black's Law Dictionary (Seventh Edition): *"The act of discovering or revealing something that was hidden"*. Once the written material as well as the statement of the accountant explaining the details therein as "concealed income" were found

and recorded during the search, the inconsistent statements of the partners in that regard could create a controversy regarding concealment of income, but could not obliterate the factum of detection.

9.1 It was also factually incorrect to say that the Department had not taken any action on the basis of the concealment detected during the course of search, since notice under section 148 of the Income-tax Act was already issued to the assessee before filing of the revised return by it. And, on the legal aspect of the matter, disqualification for the Amnesty Scheme on account of prior detection of concealed income did not depend upon any action being taken after the detection. The other requirement for application of the Amnesty Scheme of disclosure having to be voluntary and in good faith is not even touched upon by the Tribunal in its order. In such circumstances, the Tribunal was totally unjustified in holding that the Department had failed to detect any concealed income and merely seizure of a paper and a statement of an employee, which had been rebutted immediately by the partners of the firm, could not be treated as detection.

10. The question whether the assessee had made full disclosure, voluntarily and in good faith, prior to the detection was a mixed question of law and fact and it was required to be decided in light of the language and intention of the aforesaid order dated 14.2.1986 and the Circular No.451 dated 17.2.1986 issued by the C.B.D.T. making, *inter alia,* above quoated clarifications regarding declaration of higher income. It was a legal error to ignore or not to apply them in a proper manner. Each of the clarifications in reply to Questions No.1, 12 and 19 as reproduced hereinabove, clearly disentitled the assessee to the benefits of the Amnesty Scheme.

11. Therefore, we have no hesitation in holding that, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was not justified in holding that the assessee firm was entitled to the benefits of the Amnesty Scheme in respect of the entire amount of Rs.2,25,000/-. In view of the provisions of the Amnesty Scheme and clarification in answer to Question No.1 quoted hereinabove, the assessee was required to file returns for the relevant years and, that having

not been done in the facts of the present case, the benefits of the Amnesty Scheme could not have been availed by the assessee for any amount.

The Reference is accordingly answered in the negative and in favour of the Revenue with no order as to costs.

Sd/-

(R.S.Garg, J.)

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)